2001

State of Utah v. Daniel Duane Etherington II : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. DANIEL DUANE ETHERINGTON II Defendant/Appellant.	Case No. 20010308-CA Priority No. 2

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT, UTAH COUNTY, STATE OF UTAH, FROM A CONVICTION OF ASSAULT BY A PRISONER, A THIRD DEGREE FELONY, BEFORE THE HONORABLE LYNN W. DAVIS

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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred in failing to amend the information from assault by a prisoner to assault on a correctional officer pursuant to *State v. Hill*, 688 P.2d 450 (Utah 1984). This issue presents this Court with a question of law that is reviewed for correctness with no particular deference afforded to the trial court's ruling. *State v. Kent*, 945 P.2d 145, 146 (Utah App. 1997) (quoting *State v. Vogt*, 824 P.2d 455, 456 (Utah App. 1991)). This issue was preserved in a pre-trial motion (R. 47-50).

CONTROLLING STATUTORY PROVISIONS

Utah Code Annotated § 76-5-102.5 - Assault by prisoner.

Any prisoner who commits assault, intending to cause bodily injury, is guilty of a felony of the third degree.

Utah Code Annotated § 76-5-102.6 - Assault on a correctional officer.

Any prisoner who throws or otherwise propels fecal material or any other substance or object at a peace officer or correctional officer is guilty of a class A misdemeanor.

STATEMENT OF THE CASE

A. Nature of the Case

Daniel Duane Etherington II appeals from the judgment, sentence and commitment of the Fourth District Court after being convicted by a jury of assault by a prisoner, a third degree felony.

B. Trial Court Proceedings and Disposition

Daniel Duane Etherington II was charged by information filed in Fourth District Court on or about October 25, 2000, with assault by a prisoner, a third degree felony, in violation of Utah Code Annotated § 76-5-102.5, and criminal mischief, a class A misdemeanor, in violation of Utah Code Annotated § 76-6-106(1)(c)(d) (R. 5).

On or about October 30, 2000, Etherington filed a notice of 120 day disposition with the Utah County Jail (R. 11-12).

On November 20, 2000, a preliminary hearing was held before the Honorable Lynn W. Davis (R. 29-30, 143). After the hearing, the trial court found probable cause that Etherington committed the offenses (R. 143 at 35). Etherington was also arraigned on the charges and "not guilty" pleas were entered (R. 143 at 35).

On January 3, 2001, Etherington filed a Motion to Amend the Information to the lessor charge of assault on a correctional officer, a class A misdemeanor, in violation of Utah Code Annotated § 76-5-102.6 (R. 47-50). On January 16, 2001, Judge Davis denied Etherington's motion by written memorandum decision (R. 62-65).

On February 2, 2001, a jury trial was held on the charges with Judge Davis presiding (R. 70-72, 144). At the close of the State's case, Judge Davis granted Etherington's motion to dismiss the criminal mischief charge (R. 71, 144 at 117). Judge Davis also granted Etherington's motion that the jury be instructed on the charge of assault on a correctional officer as a lessor-included offense to assault by a prisoner (R. 70-71, 92, 144 at 145-52). After a 4.5 hour deliberation, the jury returned with a verdict of guilty to the charge of assault by a prisoner, a third degree felony (R. 70, 105).

On March 13, 2001, Etherington was sentenced to an indeterminate term of 0-5 years in the Utah State Prison (R. 114-15).

On March 27 and April 12, 2001, Etherington filed a Notice of Appeal in Fourth District Court (R. 118, 125).

STATEMENT OF RELEVANT FACTS

Gregory Knapp works at the Utah County Jail for the Utah County Sheriff's Office (R. 144 at 54-55). On October 19, 2000, at approximately 2:00 p.m., Knapp met with Etherington, who was an inmate at the jail, in an interview room for a disciplinary hearing for some alleged jail rule violations (R. 144 at 57, 58-59). The interview room is approximately 8x10 feet with one door that has a 3x2 window on it (R. 144 at 57). In the center of the room was a table with a tape recorder on it and with two chairs on either side (R. 144 at 57). During the meeting, Knapp sat on one chair and Etherington sat on the other (R. 144 at 57).

Knapp testified that he "explained to Etherington why we were there. I explained to him that we had some concerns that we wanted to discuss with him. And then I explained to him his rights in answering those concerns. I then gave him the opportunity to explain to me his version of what had happened on the day that we were discussing. He refused to answer. He said that he would appeal whatever decision I came up with" (R. 144 at 59, 80). Knapp testified that Etherington also refused to call any witnesses (R. 144 at 60). Knapp also testified that Etherington was "very argumentative" (R. 144 at 61). The major violation of which Etherington was accused consisted of placing items--including bedding, papers and toothpaste--in front of the security camera which was placed in his cell (R. 144 at 96).

Knapp testified that he found Etherington "guilty of breaking the jail rules" and informed him of the decision (R. 144 at 62). As a consequence of the decision, Knapp informed Etherington that all materials---including his mattress--except "the clothes on his back and a roll of toilet paper" would be removed from his cell (R. 144 at 63, 79, 80). According to Knapp, Etherington became "very agitated" at this point and told Knapp that if "[y]ou touch any of my person[al] stuff, when we get back there, I'm

going to break your neck, straight up. Those are my personal, legal papers" (R. 144 at 63).

Knapp testified that he "tried to calm Mr. Etherington down and explain to him that it was not something that was negotiable" and that the property had already been removed (R. 144 at 64). According to Knapp, Etherington responded "If you touch them, it is against the law and I have a right to use force to defend them. You will be in a fight, if you start this shit" (R. 144 at 64). Knapp testified that at this point Etherington had "raised out of his seat" and was leaning across the table yelling at him (R. 144 at 64). At Knapp's request, Etherington sat down (R. 144 at 64).

Knapp then explained to Etherington that he would have the opportunity to have the materials returned to his cell if he followed the jail rules (R. 144 at 65). Etherington responded that he had a legal right to have his legal papers and documents and that he had a trial in twenty days (R. 144 at 65). Etherington, according to Knapp, also told him that he would get his "ass kicked" if he touched the papers (R. 144 at 65). Knapp testified that Etherington was "very agitated" and that "his hands were over the table clenched in fists" (R. 144 at 66).

Knapp testified that he again tried to calm Etherington (R. 144 at 66) and that "at this point Mr. Etherington's hands went up from above the tale to down underneath the table" (R. 144 at 66). Knapp told Etherington that the materials had already been removed and Etherington "tipped the table into my lap and slammed me into the wall behind me" (R. 144 at 67). One of the metal legs on the table broke (R. 144 at 67). Knapp testified that the force "knocked [him] off balance" and that his "left hand went back to the wall to try to keep from falling over" and his right hand caught Etherington's neck (R. 144 at 68). Knapp testified that Etherington "was continuing to

push the table against [him], slamming [him] against the wall" while he tried to push Etherington away (R. 144 at 68, 69).

Almost immediately, a few deputies who had heard the commotion came into the room, put Etherington in restraints, and returned him to his cell (R. 144 at 69-70).

Knapp testified that the hearing with Etherington was a disciplinary hearing and that the written procedures for such a hearing had been followed (R. 144 at 74-75). In this case the hearing concerned some "major violations" as opposed to minor or criminal violations (R. 144 at 75-76). Knapp admitted that removal of Etherington's property was a sanction for the rule violations (R. 144 at 79). However, Knapp also admitted that removal of legal and personal property, bedding, etc. is not listed as one of the twelve sanctions that can be taken for major violations (R. 144 at 83, 92). Knapp testified that the property was removed pursuant to Policy No. 804 which reads "It will be the policy of this department that staff will take whatever actions are reasonable and necessary to maintain the security of the facility and the safety of all persons as mandated by pertinent laws, rules, and regulations" (R.144 at 84). Knapp also testified that the listed sanctions had previously been imposed on Etherington but that he continued to violate the jail rules (R. 144 at 98).

Etherington testified that he has been diagnosed with paranoid schizophrenia and bipolar disorder (R. 144 at 119). In regards to the disciplinary hearing, Etherington "felt that when they did it, that they had found [him] guilty prior, because Deputy Knapp said they went down into [his] cell and had taken [his] stuff before--while the hearing was being conducted... And they violated--[he] felt they violated [his] due process rights, violated [his] First Amendment rights to have [his] things, and be able to petition grievances to [his] government..." (R. 144 at 119-20).

Etherington testified that he covered the security camera for several privacy reasons: One, because he did not want to be observed while using the toilet. Two, because the deputies would use the speaker to make commentary about his use of the toilet. (R. 144 at 120-21). Etherington also used covered the camera as a means of communication in order to get staff's attention "because they yell at us if we push our button, and we can get a write up" (R. 144 at 121).

Etherington admitted that he got upset at the hearing because he felt that his rights were being violated (R. 144 at 122). Etherington also admitted to yelling at Knapp because he needed his legal papers in order to prepare for upcoming trials and because he had witness statements that he did not want the jail personnel to have access to which related to a civil rights suit that he intended to file against the jail (R. 144 at 122-23). Etherington said that he did tell Knapp that he would "beat him up" if he took his legal documents and his journal (R. 144 at 123).

Etherington testified that in regards to the table, "I got up a little bit quick and it knocked the table over because I had my hands in my lap. I stood up kind of like this, and the chair was still there, and I kind of pushed it over, and pushed the table a little bit. And then when it was in my way, I just kind of picked it up a little bit and Deputy Knapp grabbed me by the throat, and I pushed it against him to get him to let me go" (R. 144 at 125). Etherington testified that Knapp let go of his neck after the other deputies arrived and that while the hold "didn't really hurt" he "started getting tunnel vision" because circulation was being cutt off (R. 144 at 125). Etherington testified that he had a scrape down the side of his neck and chest (R. 144 at 126). When he pushed the table, Etherington testified that he had no intention to hurt Knapp (R. 144 at

127). Etherington testified that he would use sufficient force to protect his personal property (R. 144 at 141).

SUMMARY OF ARGUMENT

Etherington asserts that the trial court erred in refusing to amend the information from assault by a prisoner, a third degree felony, to assault on a correctional officer, a class A misdemeanor. Pursuant to *State v. Hill*, 688 P.2d 450 (Utah 1984), "when an individual's conduct can be construed to be in violation of two overlapping statutes, the more specific statute governs." Etherington asserts that the assault by a prisoner statute and the assault on a correctional officer statute overlap and that his conduct can be construed to be in violation of either statute. Accordingly, the statute which more specifically covers his conduct--the assault on a correctional officer--governs and the trial court erred in refusing to amend the information to that statute.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO AMEND THE INFORMATION TO ASSAULT ON A CORRECTIONAL OFFICER PURSUANT TO *STATE v. HILL*

Etherington was charged with assault by a prisoner for threatening Deputy Knapp if he removed personal belongings from his cell and then propelling a table at the deputy during a disciplinary hearing at the Utah County Jail. Etherington filed a

pre-trial motion, pursuant to *State v. Hill*, 688 P.2d 450 (Utah 1984), which asserted that the information should be amended to assault on a correctional officer, a class A misdemeanor (R. 47-50). The trial court denied the motion (R. 62-65). Etherington asserts that the trial court erred in denying the motion and that this Court should correct this legal ruling.

The defendant in *Hill* received money from an undercover agent for one ounce of baking soda which he claimed was cocaine. He was convicted of theft by deception, a second degree felony, and appealed on the ground that his conduct was more specifically governed by the statute which prohibits distribution of an imitation controlled substance. *Hill*, 688 P.2d at 451. The Utah Supreme Court agreed and held that "when an individual's conduct can be construed to be in violation of two overlapping statutes, the more specific statute governs." *Hill*, 688 P.2d at 451.

Etherington asserts that the holding in *Hill* is applicable to the case at hand. Hill's conduct was fully covered by both a general (theft by deception) and a specific statute (distribution of an imitation controlled substance). Etherington's conduct was likewise covered by a general (assault by a prisoner) and a specific (assault on a correctional officer) statute.

Clearly both Utah Code Annotated § 76-5-102.5 (assault by a prisoner) and Utah Code Annotated § 76-5-102.6 (assault on a correctional officer) overlap. Both statutes criminalize assaultive behavior. Implicit in the assault by a prisoner statute is the fact that the assault could be against a correctional officer. Similarly, implicit in the assault on a correctional officer statute is the notion that the assaultive behavior could be undertaken by jail of prison inmates. *See e.g.*, *State v. Mendoza*, 938 P.2d 303 (Utah App. 1997) (inmate charged with assault on correctional officer). However, Utah Code

Annotated § 76-5-102.6 which makes it a crime to throw or propel any substance or object at a correctional officer more specifically covers Etherington's conduct of propelling the table at Deputy Knapp than does the more general assault by a prisoner statute.

Accordingly, Etherington requests that this Court conclude that because his conduct can be construed to be in violation of two overlapping statutes, the more specific statute--which in this case is assault on a correctional officer--governs. *Hill*, 688 P.2d at 451. Etherington asks that this Court correct the trial court's error in failing to amend the information to assault on a correctional error.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, Etherington asks that this Court reverse his conviction for assault by a prisoner.

RESPECTFULLY SUBMITTED this 15 day of February, 2002.

Margaret P. Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief Of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 15 day of February, 2002.

ADDENDA

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IN THE FOURTH JUDICIAL DISTRICT COURT, STATE OF UTAH,

UTAH COUNTY, PROVO DEPARTMENT

STATE OF UTAH Plaintiff, v. DANIEL DUANE ETHERINGTON, II, Defendant.	**MOTION AND MEMORANDUM TO AMEND INFORMATION TO LESSER CHARGE** Case No. 001404083 JUDGE DAVIS

The Defendant, DANIEL DUANE ETHERINGTON, II, through his attorney, JARED W. ELDRIDGE, moves this Court to amend Count I of the Information in this case from Assault by a Prisoner, a Third Degree felony, § 76-5-102.5 U.C.A. (1974), to Assault on a Correctional Officer, a Class A misdemeanor, § 76-5-102.6 U.C.A. (1994). The Defendant bases this motion on the following memorandum.

ARGUMENT

The allegation in this case is that Mr. Etherington, a prisoner in the Utah County Jail, assaulted Deputy Greg Knapp by overturning a table on Deputy Knapp's lap.

The State has charged Mr. Etherington with violating § 76-5-102.5 U.C.A. (1974), Assault by a Prisoner, which states,

> Any prisoner who commits assault, intending to cause bodily injury, is guilty of a felony of the third degree.

However, the alleged illegal conduct in this case could also be proscribed by another statute, § 76-5-102.6 U.C.A. (1994), which states,

> Any prisoner who throws or otherwise propels fecal material or any other substance or object at a peace or correctional officer is guilty of a Class A misdemeanor.

Well established case law in the State of Utah establishes two propositions. First, when two different statutory provisions define an offense, a defendant must be sentenced under the provision carrying the lesser penalty. State v. Shondel, 453 P.2d 146, 148 (Utah 1969). Second, "when an individual's conduct can be construed to be a violation of two overlapping statutes, the more specific statute governs." State v. Hill, 688 P.2d 450, 451 (Utah 1984).

Under either one of these well established principles of Utah case law the charge in this case should be amended to the Class A misdemeanor of Assault on a correctional officer.

I. STATE V. SHONDEL REQUIRES THAT WHERE THERE IS DOUBT OR UNCERTAINTY AS TO WHICH OF TWO PUNISHMENTS IS APPLICABLE TO AN OFFENSE AN ACCUSED IS ENTITLED TO THE LESSER.

The two statutes set our above clearly proscribe essentially the same conduct, especially as the statutes are applied to this case in particular. The Shondel case states, "where there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser." 453 P.2d at 148.

The two statutes in question in this case are clearly overlapping because both clearly apply to, "any prisoner," and involve assaultive behavior. § 76-5-102.5 U.C.A. and § 76-5-102.6 U.C.A. However, the language used in § 76-5-102.5, which is the statute Mr. Etherington is charged with violating, is clearly very broad and appears to apply to assaults committed by prisoners in general. In looking more closely at § 76-5-102.6 it is clear that the conduct proscribed is a specific type of assault. § 76-5-102.6 proscribes conduct where,

> **Any prisoner who throws or otherwise propels** fecal material or **any** other substance **or object at a peace or correctional officer** is guilty of a Class A misdemeanor.

(emphasis added). In this particular case, the allegation is that Mr. Etherington threw or propelled an object, a table, at Deputy Greg Knapp, a correctional officer.

In considering the two statutes above and applying the instruction of the Utah Supreme Court, without doubt the statute that should be applied to this particular case is § 76-5-102.6, assault on a correctional officer, a Class A misdemeanor.

CONCLUSION

Based on authority and argument set out above, Mr. Etherington respectfully requests that his motion be granted and that the charge against him be amended to § 76-5-102.6, which is the statute with the lesser penalty and that is more specific.

DATED this 3 day of January, 2001.

JARED W. ELDRIDGE
Attorney for Defendant

Interestingly, in coming to this conclusion the Court looked at several different ways of trying to determine which statute applied. In their first attempt to determine which statute applied the Court stated, "we first direct attention to the generally-recognized rule that where there is conflict between two legislative acts the latest will ordinarily prevail." Id. at 147. The Court then went on to explain that this generally recognized rule did not help in the Shondel case because the two conflicting statutes where both passed in the same legislative session. Id.

However, in our case this generally recognized rule is very enlightening. The statute Mr. Etherington is charged with violating, § 76-5-102.5, was enacted in 1974. On the other hand, § 76-5-102.6, the Class A misdemeanor, was enacted in 1992 and then amended in 1994.

In applying the generally recognized rule the Court referred to in Shondel, clearly the latest and most applicable statute is § 76-5-102.6, which was enacted in 1992 and is a Class A misdemeanor.

By employing the process the Court used in eventually coming to a decision or applying the actual conclusion of the Shondel case the answer is the same in this case, the applicable statute is § 76-5-102.6 which carries the less severe penalty and is the most recently enacted statute.

II. WHEN AN INDIVIDUAL'S CONDUCT CAN BE CONSTRUED TO BE A VIOLATION OF TWO OVERLAPPING STATUTES, THE MORE SPECIFIC STATUTE GOVERNS.

In State v. Hill, the Utah Supreme Court stated, "when an individual's conduct can be construed to be a violation of two overlapping statutes, the more specific statute governs." 688 P.2d at 451.

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH Plaintiff, vs. DANIEL ETHERINGTON, Defendant.	RULING ON DEFENDANT'S MOTION TO AMEND INFORMATION TO LESSER CHARGE CASE NO. 001404083 DATE: JANUARY 30, 2001 JUDGE: LYNN W. DAVIS CLERK: LG

Defendant filed a "Motion and Memorandum to Amend Information to Lesser Charge on January 3, 2001. The State of Utah filed its "Response to Defendant's Motion to Amend Information to Lesser Charge," on January 16, 2001. No reply brief has been filed and neither party has requested oral argument. The court, having carefully reviewed the memoranda of the parties, now enter the following findings and ruling:

I

FACTS

The defendant presents facts contained in one sentence. The more detailed "Statement of Facts" contained in the State's memorandum, has not been disputed or objected to. Accordingly, the court adopts the more detailed version.

1. On or about October 19, 200, Deputy Greg Knapp of the Utah County Sheriff's Department conducted an administrative disciplinary hearing at the Utah County Jail with the defendant in this case, Daniel Etherington.

2. During the course of the hearing, Deputy Knapp read the allegations against the defendant that led to the disciplinary hearing. The defendant plead not guilty to each of the accusations made against him. However, during the defendant's argument he admitted to

using foul and abusive language and tampering with a security device. Based on the evidence presented, the defendant was found guilty on all four charges.

3. Deputy Knapp explained to the defendant that due to the finding of guilt, everything was being removed from his cell. The defendant then became upset. He stood up and clenched his hands on top of the table separating the defendant and Deputy Knapp. The defendant then threatened the deputy with consequences if he attempted to remove property from his cell; the defendant declared: "I'm going to break your neck" and "you're going to get your ass kicked."

4. Deputy Knapp asked the defendant to sit back down and "calm down," but the defendant continued to become more agitated. The defendant then put his hands on the table, tipped the table onto Deputy Knapp's lap and pushed the table and Deputy Knapp into the wall, pinning Deputy Knapp to the wall with the table. During the course of the assault, one of the legs of the table was broken off.

5. Several other deputies entered the room to assist in controlling the defendant. The defendant was eventually subdued and handcuffed.

II

LEGAL ARGUMENT

The defendant argues that §76-5-102.5 U.C.A. (1974), and §76-5-102.6 U.C.A. (1994) proscribe essentially the same conduct and therefore State v. Shondel 453 P.2d at 148, should apply and the defendant should be charged with the lesser offense. However, §76-5-102.5 U.C.A. (1974), is clearly distinguishable from §76-5-102.6 U.C.A. (1994) since the statute that the defendant is being charged with requires an element of intent. Under §76-5-102.5 U.C.A. (1974), the defendant must have committed the offense with the intent to cause bodily injury; whereas §76-5-102.6 U.C.A. (1994) has no such requirement.

The Shondel case established that when two different statutes proscribe essentially the same conduct, then the defendant is entitled to the benefit of the lesser offense. However, in State v. Kent, 945 P.2d 145 (Utah Ct. App. 1997), the court clarified that distinction and stated that "[i]f the elements of the crime are not identical and the relevant statutes require 'proof of some fact or element not required to establish the other,' the statutes do not proscribe the same conduct and [the defendant] may be charged with the crime carrying the more severe sentence." Id. (quoting State v. Clark, 632 P.2d 841, 844 (Utah 1981)). See also; State v. Kerekes, 622 P.2d 1161 (Utah 1980); State v. Fisher, 972 p.2d 90 (Ut. Ct. App. 1998); State v. Cross, 649 P.2d 72 (Utah 1982). It is obvious that the two statutes in question here are not overlapping statutes and do not proscribe the same conduct. Subsequently, under Kent, the defendant can be charged with the more severe offense.

It is clear from the facts alleged by both the State and the Defense that the defendant became physically and verbally threatening and abusive during the course of a disciplinary hearing. The defendant first threatened the deputy when he stated that he was going to break the deputy's neck. Shortly thereafter, the defendant tipped the table over onto the deputy, pinning him to the wall. It can be argued that these actions were taken with the intent to commit bodily harm upon the deputy which is proscribed by the statute under which the defendant is charged.

III

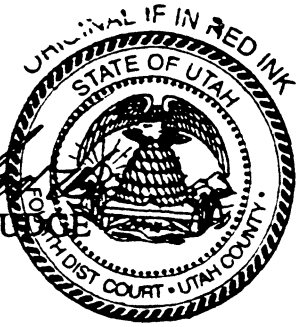
RULING

This court denies the defendant's Motion to Amend to a Lesser Charge. The "Shondel Rule" is inapplicable because the elements of the various charges are distinguishable. In addition, the facts as alleged both by the Defense and by the State, even if proved at trial, cannot support a finding that the defendant "threw" or "otherwise propelled" the table at the officer.

Dated this 30 day of January 2001.

BY THE COURT

LYNN W. DAVIS, JUDGE



cc: David S. Sturgill
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